RECORD AND BRIEFS

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No. 17-387

IN THE
Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Lundgrens' opposition rests on two main arguments: (1) Washington property law is exceptional because of its "unique doctrine of automatic title in adverse possession"; and (2) no sovereign interests would be offended by the court's exercise of jurisdiction in the quiet title action because the Lundgrens are likely to prevail on the merits of their adverse possession claim. Both arguments fail as a matter of law. Under the Supremacy Clause, if a "unique" feature of Washington law conflicts with federal law, it must yield to the interests protected by federal law. Nor is there a "likelihood of success on the merits" condition to the viability of a sovereign immunity defense. To hold otherwise would render moot the common law shield of sovereigns.

The Lundgrens' opposition attempts to bury the clear court split on the law in immaterial factual distinctions. The lower courts are divided on a basic legal issue that this petition squarely presents: are *in rem* actions an exception to the jurisdictional bar of sovereign immunity where there has been no waiver by the Tribe or abrogation by Congress?

In the 5-4 decision below, the Washington Supreme Court answered yes: *in rem* jurisdiction is an exception to sovereign immunity even where no waiver or abrogation has occurred. The North Dakota Supreme Court agreed, but both rulings conflict with the decisions of the Second Circuit and New Mexico Supreme Court.

The North Dakota and Washington rulings also rest on a misreading of this Court's holding in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). That decision did not create a third exception to sovereign immunity for cases proceeding *in rem* against tribal property interests. The Lundgrens' arguments to the contrary highlight the intensifying debate over this important issue of federal law.

This Court should accept review to resolve the split in authority and conform the decision below to the unambiguous rulings of this Court.

REASONS WHY CERTIORARI IS WARRANTED

A. Tribal sovereign immunity is a matter of federal law, which preempts conflicting state law under the Supremacy Clause.

The Lundgrens argue that "[t]his is an issue of state law" turning on the "unique doctrine of automatic title in adverse possession" under Washington law.[1] But the issue raised here does not turn on the state law elements of the specific claim against the Tribe—establishing adverse possession. It is controlled by the Tribe's sovereign immunity, which "is a matter of federal law." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 759 (1998).

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[1] Opp'n to Pet. for Cert. at 2, 6.

Tribal immunity is an absolute jurisdictional bar, absent abrogation by Congress or waiver by the Tribe. *Id.* at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). The Tribe did not waive immunity. Nor has there been abrogation: the Washington Supreme Court did not even examine the issue much less hold that Congress had unequivocally abrogated tribal sovereign immunity where an action lay *in rem*, as here, to quiet title in disputed property held by tribes. Since neither exception to sovereign immunity applies, the Tribe's sovereign immunity barred suit.

Tribal immunity "is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756. Any state law that purports to diminish tribal immunity recognized under federal law is preempted under the Supremacy Clause. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) ("The Supremacy Clause makes the laws of the United States 'the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Put simply, federal law preempts contrary state law." (citing U.S. Const., Art. VI, cl. 2)); *accord Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 431 (1989) ("Since the tribes' protectible interest is one arising under federal law, the Supremacy Clause requires state and local governments . . . , to recognize and respect that interest in the course of their activities.").

If Washington law contains a "unique" approach to adverse possession that would, if upheld, defeat tribal immunity, federal law preempts that result.

B. "Likelihood of success on the merits" is irrelevant to the viability of sovereign immunity.

The Lundgrens argue that "sovereign immunity does not bar the exercise of *in rem* jurisdiction where a tribe received a conveyance of title many decades after title was lost through adverse possession."[2]

The purpose of sovereign immunity—to prevent "the indignity of subjecting a [sovereign] to the coercive process of judicial tribunals at the instance of private parties," *Alden v. Maine*, 527 U.S. 706, 749 (1999)—would be entirely defeated if the availability of the shield turned on the merits of the underlying claims. *Accord Koehler v. United States*, 153 F.3d 263, 267 (5th Cir. 1998) ("At its core, sovereign immunity deprives the courts of jurisdiction irrespective of the merits of the underlying claim."); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) ("since the issue of tribal sovereign immunity is jurisdictional in nature, we must first determine whether the Band has effectively waived tribal immunity—thus making it amenable to suit in federal court—irrespective of the merits of Pan Am's tort and contractual claims" (internal citations omitted)); *Foremost-McKesson, Inc. v. Islamic*

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[2] Opp'n to Pet. for Cert. at 2.

Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits" (citation omitted)).

The gist of the Lundgrens' argument appears to be that the Tribe never had title so the Tribe is being deprived of nothing. In fact, the Tribe did pay for the land. But the issue here is not whether the Tribe has title, or ever had title, or any other aspect of the merits of the case. The issue is whether the Tribe is subject to an action that tests its title. It is not.

C. The decision below contributes to an intensifying conflict among the lower courts.

The Lundgrens attempt to dismiss the court split based on factual distinctions: e.g., that the contrary rulings involved actions to tax or foreclose on tribal property or actions in which the tribe's title to property was not in question.[3] But these factual distinctions are beside the point.[4] The cases on either side of the split involve *in rem* actions. The courts articulate their rulings based on their view of whether *in rem* jurisdiction overcomes the jurisdictional bar of

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[3] Opp'n to Pet. for Cert. at 5–8.

[4] The Lundgrens' subsequent arguments show they recognize the irrelevance of this distinction. *Id.* at 11 ("No practical or theoretical reason exists to treat the exercise of *in rem* jurisdiction over a quiet title action differently than *in rem* jurisdiction over a property tax case affecting tribal land.").

sovereign immunity. *Compare Lundgren v. Upper Skagit Indian Tribe*, 187 Wash. 2d 857, 865–67, 389 P.3d 569 (2017) (citing to *County of Yakima* for proposition that "[a] court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity"), *and Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W. 2d 685, 691, 694 (N.D. 2002) (holding that *in rem* condemnation action may proceed and citing *County of Yakima* for the proposition that "[c]ourts have recognized distinctions in application of the doctrine of tribal sovereign immunity based upon the in rem or in personam nature of the proceedings"), *with Cayuga Indian Nation v. Seneca Cty.*, 890 F. Supp. 2d 240, 247–48 (W.D.N.Y. 2012) (rejecting argument that *County of Yakima* "stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* [foreclosure] proceedings"), *aff'd*, 761 F.3d 218, 221 (2d Cir. 2014) (declining to read an "implied abrogation" into *County of Yakima* or "draw . . . novel distinctions—such as a distinction between *in rem* and *in personam* proceedings" as applied to the doctrine of tribal sovereign immunity from suit), *and Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 985 (N.M. 2016) (rejecting characterization of *County of Yakima* as authorizing "the tribe's amenability to suit in court based on a concept of an *in rem* exception to immunity" and noting that "in the context of tribal sovereign immunity there exists no meaningful distinction between *in rem* and *in personam* claims").

The reasoning by each court shows that the split does not arise from factual differences but from

opposing views of the law: the effect of *in rem* jurisdiction on tribal sovereign immunity. The New Mexico Supreme Court and the dissenting justices in the decision below expressly identified this split in articulating their legal analysis of the sovereign immunity issue. *See Hamaatsa*, 388 P.3d at 986 (acknowledging the contrary decisions by the North Dakota and Washington Supreme Courts but choosing "to follow the Second Circuit, and thereby refus[ing] to recognize an exception to tribal sovereign immunity for *in rem* proceedings"); *Lundgren*, 187 Wash. 2d at 876 n.1 (Stephens, J., dissenting) (acknowledging that "recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity, particularly since the Supreme Court issued its decision in *Bay Mills*, which reiterated the importance of sovereign immunity").

The same legal controversy is also evident among the lower federal and state courts.[5] This Court's intervention is necessary to clarify its holding in *County of Yakima* to resolve this split.

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[5] Pet. for Cert. at 8–10.

D. The decision below is contrary to this Court's decisions in *County of Yakima* and *Bay Mills*.

The decision below is not supported by this Court's holding in *County of Yakima*. That case turned on the finding of express abrogation in the Burke Act proviso.[6] The purpose of the discussion of *in rem* jurisdiction in that case was to explain that the ruling in *County of Yakima* was consistent with an earlier Supreme Court decision.[7] The passing discussion of *in rem* jurisdiction in *County of Yakima* sheds no light on the legal conflict at issue here.[8] The Lundgrens cite only one Washington case to support their contrary argument.[9] Washington cases cannot be determinative of this issue of federal law. In fact, the dissenting justices in the decision below said that Washington case law may "rest[] on a misreading of *County of Yakima*," which "will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*." *Lundgren*, 187 Wash. 2d at 876 n.1 (Stephens, J., dissenting).

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[6] Pet. for Cert. at 10–13.

[7] Pet. for Cert. at 12.

[8] Opp'n to Pet. for Cert. at 10–11.

[9] Opp'n to Pet. for Cert. at 10–13 (citing *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 873–74, 929 P.2d 379 (1996)).

In *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), this Court reaffirmed that a tribe may lose sovereign immunity in only two ways: (1) if Congress abrogates sovereign immunity; or (2) if the tribe waives sovereign immunity. *Id.* at 2030–31.

This Court has recognized "Congress' role in reforming tribal immunity" and has held that courts should defer to Congress because it "is in a position to weigh and accommodate the competing policy concerns and reliance interests," and "address the issue by comprehensive legislation." *See Kiowa Tribe*, 523 U.S. at 759–60 (declining request to create exception to sovereign immunity for suits arising from a tribe's commercial activities, even when they take place off Indian lands). "Congress has acted against the background of [Supreme Court] decisions" and "restricted tribal immunity from suit in limited circumstances." *Id.* at 758 (citing mandatory liability insurance and gaming activities as examples).[10]

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[10] For this reason, the Lundgrens' claims about the risks of upholding the Tribe's sovereign immunity in this case are hyperbole ("If the Tribe's immunity argument is accepted, anyone in Washington state who lost their interest in property to an adverse possessor could extinguish the adverse possessor's vested title by transferring record title to an Indian tribe" Opp'n to Pet. for Cert. at 10). In areas where Congress deems it appropriate, legislation is introduced to abrogate sovereign immunity in specific situations. *See*, e.g., To Abrogate the Sovereign Immunity of Indian Tribes as a Defense in Inter Partes Review of Patents, S. 1948, 115th Cong. (2017) (response to patent assignments to Indian tribes in attempt to protect patents from invalidity challenges in *inter partes* review before the Patent Trial and Appeal Board).

In the absence of abrogation or waiver, the courts are not at liberty to recognize a third exception to sovereign immunity. Here, absent either exception, the Tribe's sovereign immunity barred jurisdiction.

E. The decision below presents a threshold jurisdictional issue of federal law that merits clarification of this Court's holding in *County of Yakima*.

The relevant facts controlling the outcome of this case are undisputed. The Lundgrens do not argue that there has been either waiver or congressional abrogation of sovereign immunity. Accordingly, this case is an ideal vehicle to resolve the narrow issue dividing the lower courts over the reach of this Court's holding in *County of Yakima*.[11]

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[11] Because this petition does not request review of the application of Washington Civil Rule 19, the Tribe will not address the Lundgrens' arguments regarding that rule.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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